

GREGORY ALEX DEMETER : CIVIL ACTION  
:  
v. :  
:  
TODD BUSKIRK, et al. : NO. 03-4761

The following facts are essentially undisputed. On or about May 14, 2003, Plaintiff was arrested by officers of the Bethlehem Police Department and charged with theft and receipt of stolen property. (Am. Compl. ¶ 1; Demeter Dep. at 5.) After Plaintiff failed to post \$5000 bail, he was committed to the Northampton County Prison for pretrial detention. (Am. Compl. ¶ 2; Demeter Dep. at 5-6.) Plaintiff had been previously incarcerated at NCP on at least four separate occasions. (Buskirk Aff. ¶ 4.) On May 16,

2003, Defendant Todd Buskirk, NCP Warden, decided to transfer Plaintiff to the Curran-Fromhold Correctional Facility ("CFCF") in Philadelphia, (Am. Compl. ¶ 3; Buskirk Aff. ¶6), which is 62.49 miles away from NCP. (Def.'s Mem. Supp. Summ. J. at 17, n.5.) Plaintiff was transferred pursuant to an agreement between wardens of local county correctional facilities. (Buskirk Aff. ¶ 9.) Plaintiff was not given an opportunity to be heard in opposition to the transfer. (Am. Compl. ¶ 5.) At the time of his transfer, Plaintiff was litigating three *pro se* § 1983 actions against NCP officials in the United States District Court for the Eastern District of Pennsylvania, which is located in Philadelphia. (Buskirk Aff. ¶ 13.)

On May 19, 2003, Plaintiff sent a grievance slip to Defendant Buskirk requesting his return to NCP. (Pl.'s Ex. 1.) By letter dated May 29, 2003, Defendant Buskirk denied Plaintiff's grievance. (Pl.'s Ex. 2.) Enclosed with the letter were two Northampton County Public Defender appointment forms. (Demeter Dep. at 12.) Plaintiff submitted a completed form to NCP, and a criminal defense attorney thereafter entered an appearance for Plaintiff in the Northampton County Court of Common Pleas on June 23, 2003. (Id. at 20, 26.) On or about June 23, 2003, Plaintiff was transported from CFCF to NCP so that he could appear in court the next day for the preliminary hearing on the criminal charges. (Id. at 26-27.) Plaintiff was timely transferred from CFCF to NCP every time that

he received a notice of a court appearance in connection his criminal case. (Id. at 40, 53.)

Plaintiff met with his attorney for the first time on the day of his preliminary hearing. (Id. at 27.) He did not ask his attorney why she had not met with him earlier. (Id. at 30.) During their meeting, Plaintiff's attorney advised him to waive the preliminary hearing, as the prosecution would be willing to drop some of the criminal charges in exchange. (Id. at 30.) Plaintiff's attorney also advised him that waiving the preliminary hearing would enable him to promptly obtain mental health treatment, which was his main concern. (Id. at 30, 32.) Upon his attorney's advice, Plaintiff decided to waive the preliminary hearing. (Id. at 31.)

Plaintiff subsequently reconsidered his decision to waive the preliminary hearing. (Id. at 36.) He sent his attorney approximately fifteen letters requesting a preliminary hearing. (Id. at 37.) Plaintiff did not receive any response from his attorney concerning his request for a preliminary hearing. (Id. at 38.) Plaintiff also sent his attorney approximately fifteen more letters requesting that she provide him with discovery and file various motions on his behalf, including a motion for bail reduction. (Id. at 58-59, 83.) Plaintiff did not receive any response to those letters until November 2003, when his attorney provided him with copies of discovery. Plaintiff's attorney has informed him that she received the letters. (Id. at 83, 85.) She

has also advised him that her ability to represent him was not hampered by the fact that he was incarcerated at CFCF. (Id. at 69-70.) On or about October 15, 2003, Plaintiff filed a petition to remove counsel. (Id. at 62-63.)

Notwithstanding his petition to remove counsel, Plaintiff met with his attorney in November 2003 and entered a guilty plea through her on or about December 19, 2003. (Id. at 61, 73.) On February 11, 2004, Plaintiff's attorney filed a motion for bail reduction on his behalf. The motion was granted, and Plaintiff's bail was reduced to \$500. (Id. at 81-82.)

While incarcerated at CFCF, Plaintiff has been attacked twice by other inmates. (Id. at 110-111.) After Plaintiff submitted complaints to CFCF prison officials, the offending inmates were relocated in the prison. (Id. at 111.) To Defendant Buskirk's knowledge, CFCF is no more dangerous than any other county correctional institution. (Buskirk Aff. ¶ 10.)

In his Amended Complaint, Plaintiff asserts several constitutional claims against NCP Warden Todd Buskirk, NCP Director of Corrections James Smith, and NCP Intake Administrator Bob Meyers based on his transfer from NCP to CFCF.<sup>1</sup> Specifically, Plaintiff

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<sup>1</sup> In his Amended Complaint, Plaintiff does not specify whether his claims are against Defendants in their individual capacities, their official capacities, or both. Notably, the Amended Complaint does not set forth allegations that would support claims against Defendants in their official capacities. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) (noting that while personal liability can be established by merely showing that the official, acting under the color of state law, caused the deprivation of a federal right,

argues that Defendants violated his federal and state constitutional rights by transferring him to CFCF in retaliation for his filing of lawsuits against various NCP officials. Plaintiff also contends that Defendants violated his federal and state constitutional due process rights by transferring him to CFCF without first according him an opportunity to be heard in opposition to the transfer. Plaintiff further asserts that his transfer to CFCF by Defendants interfered with his access to counsel, caused unnecessary delays in his bail being reduced, and subjected him to punitive prison conditions, in violation of his federal and state constitutional rights.

## **II. LEGAL STANDARD**

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) ("Rule 56"). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v.

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"[m]ore is required in an official capacity action, . . . for a governmental entity is liable under § 1983 only when the entity itself is a moving force behind the deprivation")(internal quotation omitted). Moreover, the Amended Complaint includes punitive damages claims, which are not recoverable from individual defendants in their official capacities. Gregory v. Chehi, 843 F.2d 111, 120 (3d Cir. 1988). Accordingly, the Court construes the Amended Complaint as asserting claims against Defendants only in their individual capacities.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "If the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot

credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

### III. DISCUSSION

#### A. Defendants James Smith and Bob Meyers

Defendants argue that the Court should grant summary judgment in favor of Defendants James Smith and Bob Meyers because they did not personally participate in the decision to transfer Plaintiff to CFCF. In support of this contention, Defendants submit the affidavit of Defendant Buskirk, which states that Defendants Smith and Meyers were "not involved in the decision making process for plaintiff's transfer." (Buskirk Aff. ¶¶ 7,8.) Notably, Plaintiff's Amended Complaint makes no individualized factual allegations against Defendants Smith and Meyers. Moreover, Plaintiff has admitted that his belief that Defendant Smith was personally involved in the transfer decision was based on speculation that "Buskirk has to go to [Smith] for the decisions." (Demeter Dep. at 97-98.) Plaintiff further speculated that Defendant Meyers was personally involved in the transfer decision because he is an "administrator and advisor for Buskirk." (Id. at 98-99.)

"A defendant in a civil rights action must have personal involvement in the alleged wrongs' to be liable." Sutton v.

Rasheed, 323 F.3d 236, 249 (3d Cir. 2003) (quoting Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)). There exists no genuine issue as to Defendants Smith and Meyers's lack of personal involvement in the decision-making process surrounding Plaintiff's transfer to CFCF. Accordingly, Defendants Smith and Meyers are entitled to summary judgment as a matter of law with respect to all of Plaintiff's federal claims. See McGrath v. Johnson, 155 F. Supp. 2d 294, 305 (E.D. Pa. 2001)(granting summary judgment motion where defendants did not participate in retaliatory transfer decision).

B. Defendant Todd Buskirk

1. Retaliatory transfer

Plaintiff asserts that Defendant Buskirk violated his federal constitutional rights by transferring him to CFCF in retaliation for his filing of civil rights actions against various NCP officials. "[G]overnment actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for the exercise of a constitutional right." Allah v. Seiverling, 229 F.3d 220, 224-25 (3d Cir. 2000)(quoting Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999)(*en banc*)). A plaintiff alleging a retaliation claim must show (1) constitutionally protected conduct, (2) an adverse action by prison officials sufficient to deter a person of ordinary firmness from



exercising his constitutional rights, and (3) that his constitutionally protected conduct was a substantial or motivating factor in the decision to discipline him. Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003)(citing Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001)). Once the plaintiff has made his *prima facie* showing, the burden shifts to the defendant to prove by a preponderance of the evidence that he "would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." Carter v. McGrady, 292 F.3d 152, 158 (3d Cir. 2002)(citing Rauser, 241 F.3d at 334). As "[t]he Supreme Court has made clear that decisions of prison administrators are entitled to great deference," id., "the plaintiff must meet a high standard in order to succeed in a retaliation claim." McGrath, 155 F. Supp. 2d at 302.

As to the first element of the retaliation claim, Defendant Buskirk does not dispute that the filing of lawsuits is constitutionally protected activity. See Bounds v. Smith, 430 U.S. 817, 822 (1977)(noting that inmates have a constitutional right of meaningful access to the courts); Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997)(finding that filing of lawsuits is protected activity).

Instead, Defendant Buskirk asserts, and the Court agrees, that the mere transfer of Plaintiff from NCP to CFCF was not sufficiently adverse to deter a person of ordinary firmness from

exercising his or her constitutional rights. See Rauser, 241 F.3d at 333 (finding sufficient adverse action where defendants not only transferred prisoner to distant prison, *but also* denied his parole and penalized him financially); Allah, 229 F.3d at 225 (finding sufficient adverse action where defendants transferred inmate to another prison *and* placed him in administrative segregation); cf. Brown v. Brody, 199 F.3d 446, 455-57 (D.C. Cir. 1999) ("The clear trend of authority . . . is to hold that a purely lateral transfer . . . cannot rise to the level of a materially adverse employment action."). While Plaintiff alleges that the prison transfer chilled the exercise of his constitutional rights, his subjective fear of further retaliation has little relevance under the objective adverse action inquiry. See Thaddeus-X, 175 F.3d at 398 ("The benefits of the [adverse action] standard are that it is an objective inquiry . . . capable of screening the most trivial of actions from constitutional cognizance."). Moreover, Plaintiff's argument that the conditions of CFCF were more dangerous and punitive than the conditions of NCP fails to support a finding that the transfer ordered by Defendant Buskirk was sufficiently adverse, as Defendant Buskirk's uncontradicted affidavit states that he "was not, and [is] not, aware that CFCF houses any particular category of inmate, or that it is any more 'punitive' or dangerous than any other County correctional facility." (Buskirk Aff. ¶ 10.); see McGrath, 155 F. Supp. 2d at 305 (granting summary judgment for

prison official where inmate failed to produce any evidence that prison official knew that plaintiff inmate would be placed in restrictive housing upon prison transfer).<sup>2</sup> Indeed, the prison transfer in this case arguably facilitated Plaintiff's exercise of his constitutional rights, as CFCF is much closer than NCP to the Eastern District of Pennsylvania, the court in which Plaintiff had three *pro se* civil rights actions pending against NCP officials at the time of the transfer. See Allah, 229 F.3d at 225 (noting that whether plaintiff satisfies adverse action element "will depend on the facts of the particular case"). The Court concludes, therefore, that Plaintiff has failed to raise a genuine issue as to

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<sup>2</sup> Plaintiff has submitted a letter, purportedly sent to Defendant Buskirk, baldly alleging that the transfer to CFCF has caused him to miss at least four hearings in state court civil proceedings. Even assuming that Plaintiff did in fact miss four scheduled hearings, he presents no evidence that the state court presiding over the proceedings ordered CFCF, much less NCP, to produce Plaintiff for those hearings. This allegation fails, therefore, to advance Plaintiff's showing of adverse action by Defendant Buskirk. Plaintiff has also submitted another letter, purportedly sent to Defendant Buskirk, baldly alleging that the transfer to CFCF has interfered with his medications. Specifically, the February 8, 2004 letter advises that Plaintiff has to "wait[ ] to be seen by [a] CFCF psych doctor for two weeks or more, every time I return," which presumably causes an interruption in his receipt of medication. There is no evidence in the record that Plaintiff notified Defendant Buskirk of any medication problems resulting from the transfer prior to February 8, 2004, or that Defendant Buskirk was otherwise personally aware of Plaintiff's medication problems prior to that date. Plaintiff has not shown that the problems with his medications have persisted since he notified Defendant Buskirk. In the absence of any evidence directly attributing Plaintiff's medication problems to any act of omission by Defendant Buskirk, the allegations in the February 8, 2004 letter fail to advance Plaintiff's showing of adverse action.

whether his transfer from NCP to CFCF was an adverse action by Defendant Buskirk. In the absence of a showing of adverse action, the Court should not second-guess the decision of Defendant Buskirk to transfer Plaintiff from NCP to CFCF. Accordingly, Defendant Buskirk is entitled to summary judgment on Plaintiff's retaliatory transfer claim.<sup>3</sup>

## 2. Remaining claims

Plaintiff also asserts that Defendant Buskirk violated his federal due process rights by transferring him to CFCF without first according him an opportunity to be heard in opposition to the transfer.<sup>4</sup> Plaintiff relies on the decision of Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), wherein the United States Court of Appeals for the Third Circuit ("Third Circuit") held that in the absence of a pretrial detainee's consent, "a [prison] transfer may not ordinarily be made until the untried defendant has received notice

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<sup>3</sup> As it is uncontroverted that Defendant Buskirk had no personal involvement in, or personal knowledge of, any allegedly punitive prison conditions to which Plaintiff was subjected at CFCF, Defendant Buskirk is also entitled to summary judgment on Plaintiff's claim that the transfer to CFCF subjected him to punitive prison conditions.

<sup>4</sup> Plaintiff previously raised this claim in a motion for temporary restraining order in civil action number 03-1005 before this Court. Although civil action number 03-1005 involved an incident involving NCP officials unrelated to Plaintiff's transfer to CFCF, the Court entertained the motion in light of Plaintiff's *pro se* status. After a hearing, the Court denied the motion based on Plaintiff's failure to show a reasonable probability of success on the merits and to show that he would be irreparably harmed by the denial of injunctive relief. Demeter v. Buskirk, Civ. A. No. 03-1005, 2003 WL 22139780, at \*4 (E.D. Pa. Aug. 27, 2003).

of the proposed transfer and an opportunity to be heard in a Pennsylvania tribunal independent of the prison system in opposition to it." Id. at 961. The Cobb decision was premised on findings by the district court that the transfer of a class of pretrial detainees had substantially interfered with their speedy trial and effective assistance of counsel rights under the Sixth Amendment. Id. at 960; see also United States v. Lyon, 898 F.2d 210, 216 n.6 (1st Cir. 1990)(discussing procedural posture of Cobb). Specifically, the district court found that the pretrial detainees, who had been transferred from Philadelphia County prisons to five different Commonwealth correctional institutions ranging from 90 to 300 miles away, were deprived of pretrial interviews with counsel and missed several court appearances and parole hearings when they were not returned to Philadelphia on time. Id. at 951. The district court further found that, as a result of the missed court appearances and ensuing trial continuances, many of the pretrial detainees spent more time in pretrial incarceration than the eventual length of their sentences. Id.

Defendant Buskirk does not dispute that Plaintiff was not given an opportunity to be heard prior to his transfer to CFCF. Instead, Defendant argues, and the Court agrees, that Cobb does not control this case. Unlike the pretrial detainees in Cobb, Plaintiff has failed to adduce any evidence demonstrating that the transfer to CFCF substantially interfered with his speedy trial and

effective assistance of counsel rights under the Sixth Amendment. Plaintiff merely alleges that his transfer to CFCF resulted in a total loss of communication with his defense attorney, who never responded to any of his letters concerning his criminal case, and delayed the reduction of his bail. Plaintiff offers no evidence that defense counsel's failure to respond to his inquiries, which included a request for bail reduction, was caused by his transfer to, or the location of, CFCF. Indeed, Plaintiff's attorney advised him to the contrary. (Demeter Dep. at 69-70.) In further contrast to the pretrial detainees in Cobb, Plaintiff admits that he was returned to Northampton County in time for all of his scheduled court appearances in connection with his criminal case. (Demeter Dep. at 40, 53.) Moreover, Plaintiff had the opportunity to meet with his attorney in November 2003, prior to entering a plea on the criminal charges. (Demeter Dep. at 61, 73.) Finally, the 62.49-mile<sup>5</sup> driving distance between CFCF and NCP does not, in itself, support Plaintiff's claim, as the pretrial detainees in Cobb were transferred to prisons upwards of 300 miles away. See

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<sup>5</sup> In the August 27, 2003 Order-Memorandum denying Plaintiff's motion for temporary restraining order in civil action 03-1005, the Court roughly estimated the distance between NCP and CFCF as 77 miles. See Demeter, 2003 WL 22139780, at \*3. In connection with the instant Motion, Defendants have submitted undisputed evidence that the precise driving distance between NCP and CFCF is 62.49 miles. (Def. Mem. Supp. Summ. J. at 17 n.5). For the sake of accuracy, the Court now adopts Defendants' calculation of the driving distance between NCP and CFCF. The Court notes, however, that it would still reach the same decision in the instant case if the 77-mile calculation were used.

Ford Bey v. Lowe, Civ. A. No. 85-5873, 1986 WL 9247, at \*3 (E.D. Pa. Aug. 25, 1986)(distinguishing Cobb based on the distance of the prison transfer). As there exists no genuine issue as to whether Plaintiff's transfer to CFCF substantially interfered with his rights to a speedy trial and effective assistance of counsel under the Sixth Amendment, Cobb's due process pronouncements are not applicable to this case. Accordingly, Defendant Buskirk is entitled to summary judgment on Plaintiff's claims that the transfer to CFCF violated his speedy trial, effective assistance of counsel, and due process rights under the federal Constitution.

C. Plaintiff's Pendent State Law Claims

Plaintiff also claims that the transfer to CFCF violated his rights under the Pennsylvania Constitution. Federal courts have the power to exercise pendent jurisdiction over state law claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 (a). State claims are "so related" to federal claims when they "derive from a common nucleus of operative fact." United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). Pendent jurisdiction, however, "is a doctrine of discretion, not of plaintiff's right." Id. at 726. Indeed, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d

Cir. 1995)(quoting Gibbs, 383 U.S. at 726). Having granted Defendants' Motion for Summary Judgment in its entirety, the Court declines to exercise pendent jurisdiction over Plaintiff's state law claims. Accordingly, Plaintiff's state law claims are dismissed.

#### IV. CONCLUSION

For the foregoing reasons, the Court grants Defendants' Motion for Summary Judgment in its entirety. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY ALEX DEMETER	:	CIVIL ACTION
	:	
v.	:	
	:	
TODD BUSKIRK, et al.	:	NO. 03-4761



O R D E R

**AND NOW**, this 1st day of March, 2004, upon consideration of Defendants' Motion for Summary Judgment (Docket Nos. 12, 27), Plaintiff's responses thereto (Docket Nos. 20, 28, 33), and all related submissions, **IT IS HEREBY ORDERED** that Defendants' Motion is **GRANTED** in its entirety. Judgment is entered in favor of Defendants and against Plaintiff. This case shall be closed for statistical purposes.

BY THE COURT:

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John R. Padova, J.